No. 87-1053

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In The

Supreme Court of the United States

October Term, 1987

HERMENA PERLMUTTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

Opinion of the United States District Court for the Southern District of New York Dated February 19, 1987 ..... 1sa

Opinion of the United States District Court for the Southern District of New York Dated May 20, 1986 ..... 23sa

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 19, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Cr. 207 (RWS)

UNITED STATES OF AMERICA,

-against-

HERMENA PERLMUTTER,

Defendant.

OPINION

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SWEET, D.J.

Hermena Perlmutter ("Perlmutter") has been indicted and tried for money laundering, once in March, 1981 and again in October, 1982, and for making a false statement to an Internal Revenue Service ("IRS") agent. Specifically, Counts One and Seven of the second superseding indictment charge Perlmutter with causing material information to be concealed from the IRS by trick, scheme or device, in violation of 18 U.S.C. §§ 1001 and 2(b). Counts Two and Eight charge Perlmutter with causing a financial institution to fail to file currency transaction reports in violation of 31 U.S.C. § 1058 (in effect in March, 1981) and 31 U.S.C. § 5322(a) (the recodification of 31 U.S.C. § 1053, in effect in October, 1982). Count Ten charges Perlmutter with the making of a false statement on May 9, 1984, in violation of 18 U.S.C. § 1001.

This was a particularly hard case, well tried by skillful counsel for both the government and Perlmutter. It is painful to see a well-regarded defense counsel in the role of a defendant when the result turns upon a legal definition of intent and aiding and abetting under a since-amended statute, a definition about which reasonable men by definition can differ. Further, the difficulties are increased by the proof which overcame the presumption of innocence by the application of rational inference rather than the resolution of the credibility of witnesses with respect to a contested fact. Notwithstanding, on the facts as found below after a four-day bench trial, Perlmutter is found guilty on Counts Seven and Eight, and not guilty on Counts One, Two, and Ten.

Prior Proceedings

The original two-count indictment was filed in this case on March 10, 1986. The nine-count superseding indictment, filed April 17, 1986, was the subject of a motion to dismiss Counts One through Eight pursuant to Fed.R.Crim.P. 12(b)(2) on the grounds that these counts were facially insufficient. In its opinion of May 20, 1986, relying upon the analysis contained in *United States v. Anzalone,* 766 F.2d 676 (1st Cir. 1985), this court dismissed Counts One through Eight on the basis that private persons like Perlmutter cannot incur criminal liability for apportioning transactions to avoid reporting requirements imposed on financial institutions. The government appealed from this decision.

On June 27, 1986, while this case was on appeal, the Second Circuit, in *United States v. Heyman,* 794 F.2d 788 (2d Cir. 1986), held contrary to the conclusion reached by the First Circuit in *Anzalone* and to the effect that under 18 U.S.C. §§ 5311, 5313, and 5322, a private party could be convicted of willfully causing transactions to be structured so as to cause a financial institution to fail its legal responsibility to file currency transaction reports. In light of that opinion, this court on the government's motion reversed its prior decision.

On June 11, 1986, the second superseding indictment was filed. Before trial, Counts Three through Six were dismissed on motion of the government. On the first day of trial, January 27, 1987, the court granted the government's motion to sever Count Nine, which charged Perlmutter with obstruction of justice in violation of 18 U.S.C. § 1503.

Findings of Fact

Perlmutter is an attorney whose practice consists mostly of criminal defense and who capably acted for the defense in at least

two trials before me. During the period in question, Perlmutter had an office at 20 Vesey Street. In her employ were Laura Nadal ("Nadal"), who acted as secretary and receptionist, and Perlmutter's nephew, David Van Muraskin ("Muraskin"), an attorney.[1] Muraskin worked both on Perlmutter's cases and on his own § 18(b) cases.

In early 1981, Perlmutter, assisted her client Daniel Washington ("Washington") (later convicted of drug offenses), who declared little or no income for the years 1979-1982, in the purchase of four apartment buildings located at the corner of Seventh Avenue and 134th Street. The contract price was $60,000 — $6,000 of which was paid as a down payment by a check drawn by Perlmutter on her special account on January 29, 1981.[2] On March 2, Perlmutter incorporated for Washington the 2283 7th Avenue Corporation. At the closing on March 12, 1981, the balance of the purchase price was paid by monetary instruments as follows:

With cash supplied by Washington, Perlmutter on March 11, 1981, purchased $29,000 in Emigrant Savings Bank ("Emigrant") tellers' checks at her local branch.[3] The checks were in amounts of $1,000, $2,000, $3,000, $4,000, and $5,000, made payable to Preston Homes, Inc.; $5,000 and $5,000, made payable

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1. Seth Kaplowitz, another of Perlmutter's nephews, also worked in the office at some time during this period, but no evidence was produced which would link him with any of the transactions at issue.

2. Jerry Brown, the seller of the property, testified that the signing of the contract was handled by his attorney and Perlmutter. Brown did not meet Washington until the day of the closing.

3. Perlmutter actually purchased a total of $33,290.00 in tellers' checks, but only $29,000 of those checks were shown to have been paid to Preston Homes in connection with this transaction.

to Hermena Perlmutter.[4] The manager of Perlmutter's branch of Emigrant, Evelyn McLoughlin ("McLoughlin"), filled out a Currency Transaction Report ("CTR") for this transaction. McLoughlin testified that she almost always told customers at the time of the transaction that she was filling out a CTR. She explicitly recalled telling Perlmutter that she was doing so on one occasion, to which Perlmutter replied, "I have no objection to that. I have nothing to hide."

On the same day, March 11, $9,800 in cash was deposited in Perlmutter's special account at the Broadway branch of Merchants Bank of New York ("Merchants"), and $9,800 in cash was deposited in Muraskin's special account at the same branch.[5] The deposit slips for each were time-stamped 1:43 p.m. and 1:44 p.m., respectively, by the same teller. The handwriting on the deposit slips could not be identified by the government's handwriting expert as belonging to either Perlmutter or Muraskin, but it was identified as belonging to the same writer. The slip for the deposit into Perlmutter's account was pre-printed with Perlmutter's name and account number; the slip for the Muraskin deposit was a blank deposit slip, available at the bank, with Muraskin's name and account number filled in.

On the next day, the morning of the closing, $200 was deposited in each of Perlmutter's and Muraskin's special accounts at the Third Avenue branch of Merchants. The deposit slip for the Perlmutter deposit, which was time-stamped 9:23, was pre-printed with Perlmutter's name and account number, and the writing was identified as Perlmutter's. The slip for the Muraskin

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4. At the Emigrant Savings Bank, the only limit to the amount for which a tellers' check can be drawn for a customer is one million dollars.

5. The two $9,800 deposit are the subject of the violations charged in Counts One and Two.

deposit, time-stamped 9:29, was also pre-printed with Muraskin's name and account number.

That same day, Perlmutter and Muraskin each drew a certified $10,000 check on their respective special accounts, payable to the 2283 7th Avenue Corporation. These checks for a total of $20,000 were not actually used at the closing; instead Perlmutter drew a check for $20,500 on her special account, payable to the Title Guarantee Company, to cover back taxes. The $29,000 in tellers' checks were given to Jerry Brown, the president of Preston Homes, the seller of the property, at the closing on March 12, 1981.[6] The two $10,000 checks were endorsed back to Perlmutter and Muraskin, respectively, by Washington, and deposited into Perlmutter's account the next day, March 13, by Muraskin at the Third Avenue branch at 9:35 a.m.

The subject of Counts Seven and Eight is a transaction in connection with a purchase of real estate participated in by Perlmutter, in August through October, 1982, on behalf of her clients Peter Monsanto ("Monsanto") and Debra Manson ("Manson") for the purchase of a cooperative apartment at 3240 Riverdale Avenue in the Bronx. Monsanto and Manson, like Washington, reported no income for the years 1978 through 1982. Monsanto first sought to purchase the co-op in the name of Doll Holding Corp., which Perlmutter had incorporated for him in November, 1981. When the seller refused to sell to a corporation, Monsanto first had the contract drawn up in his name, but then substituted Manson's name.

The purchase price for the co-op was $30,000, $3,000 of which was paid in August, 1982, and the remaining $27,000 of which

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6. Present at the closing were Perlmutter, Washington, Jerry Brown, the Title Guarantee Company representative, and a man identified by Jerry Brown as a "relative" of Perlmutter's.

was paid at the time of closing in October, 1982. Nadal testified that in connection with this transaction Monsanto brought to Perlmutter's office an attache case containing $25,000 to $30,000 in small bills, which she and Monsanto counted. Nadal then gave the attache case to Perlmutter when Perlmutter returned to the office. The remaining $27,000 was paid with the following checks and money orders:

On October 13, Nadal purchased a $5,000 cashier's check from Republic National Bank, to the order to Hermena Perlmutter. On the following day, October 14, Nadal purchased another $5,000 Republic cashier's check to the order of Hermena Perlmutter. On the back of each check Perlmutter wrote "Re: Purchase of Co-op shares, 3240 Riverdale Ave., Apt. 6E, Bronx, N.Y."

That same day, ten $500 money orders were purchased from Union Federal Savings. All were made to the order of T & C Builders Co. and labelled "Re: Purchase of 3240 Riverdale," in Muraskin's handwriting. In addition, half of them were undated and listed Manson as "sender," in Muraskin's handwriting; the other half were dated October 14, 1982 and listed Manson as "sender," all in Perlmutter's handwriting.

Also on October 14, two different tellers at the Emigrant convenience branch issued two tellers' checks; one for $5,000 to the order of Hermena Perlmutter, the other for $7,000 to the order of Manson. On the back of each check Perlmutter wrote "Re: Purchase of Co-op shares, 3240 Riverdale Ave., Apt. 6E, Bronx, N.Y." The check request form for the $5,000 check was filled out by Muraskin. Although McLoughlin testified that she had searched the bank records and could not find the check request form for the check made out to Manson, she testified that Manson was not a customer of the bank and tellers' checks were only issued to customers (money orders were given to non-customers).

McLoughlin also testified that Muraskin often came to the bank on behalf of Perlmutter. The two Emigrant tellers' checks are the subject of Counts Seven and Eight of the indictment.

Count Ten

In August, 1981, Perlmutter participated in the purchase of a house at 35 Mountain Way, West Orange, New Jersey, by Glen and Diane Brown, who, like Washington, Monsanto and Manson, filed no tax returns for the years 1979-1982. The agreed price for the house was $140,000, with $14,000 as a down payment and the balance at closing. Perlmutter herself signed the contract of sale, which did not refer to the Browns. Perlmutter arranged to make the $14,000 down payment through the following transactions:

On August 19, 1981, Perlmutter purchased four Emigrant Savings Bank tellers' checks, in denominations of $5,000, $3,500, $3,500 and $2,000. A CTR was filed for this transaction. The next day, August 20, those tellers' checks were deposited into her special account at Merchants, at two different times in the day. Two of the checks, for $5,000 and $3,500, were deposited at 9:13 a.m. on August 20 at the Third Avenue branch, using two separate deposit slips, dated August 19 and filled out in Perlmutter's handwriting. The other two checks were deposited at 1:22 p.m., also using two separate deposit slips dated August 19, and in Perlmutter's handwriting. Perlmutter drew a $14,000 check, dated August 19 on her special account, payable to the sellers of the house.

The balance of the purchase price was paid at the closing on November 9, 1981. The deed to the property listed Saul and Ruth Robbins as seller, and 35 Mountain Way Corporation, a corporation formed by Perlmutter for the Browns, as buyer. At 2:10 p.m. that day, Perlmutter deposited $120,000 in $10s and

$20s into her special account at the Third Avenue branch of the Merchants Bank using a non-preprinted deposit slip. A CTR was filed for this transaction. She then drew a certified check for $120,000 on that account, payable to Ruth and Saul Robbins, and added a check for $89.76 and a Merchants teller's check for $6,000 to make up the balance.

During an IRS investigation of Washington, Special Agent Gregory Polvere ("Polvere") had discovered the CTR filed in connection with Perlmutter's $120,000 deposit on November 9, 1981. Because the transaction occurred one day after a raid on a building owned by Washington at 119 West 130th Street, in which large quantities of narcotics and money were seized, Polvere suspected that the $120,000 might have been cash paid by Washington to Perlmutter in connection with proceedings following that search. Thereafter, on or about January 30, 1984, a grand jury subpoena was issued to Merchants for the relevant records, but the bank was unable to produce records for November and December of 1981. On May 9, 1984, Polvere interviewed Perlmutter at her office.[7] In response to questions about the $120,000 deposit, Perlmutter stated that the $120,000 belonged to someone other than Washington, whom she refused to identify. She told Polvere that the bank had contacted her to ask her for her November, 1981 statement, that she had searched her files and was unable to find it, and had no idea where the check or corresponding statement was. She said she had no objection to giving the statements to them, but she just could not find them. She also told Polvere that she would not discuss her dealings with clients with him.

During a subsequent IRS civil audit of Perlmutter, Special Agent Richard Burnside requested Perlmutter's attorney, Donald

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7. Although Special Agent James MacKenna was also present at the interview, he did not testify at trial.

Israel ("Israel") to furnish materials relating to the $120,000 deposit. Israel asked Bernard Tobacman ("Tobacman"), a CPA who did accounting work for Perlmutter, to get the documents from Perlmutter's office. Tobacman went to the box in a cabinet in Perlmutter's office where he knew the bank records for the past four or five years were kept and found and copied the bank records in question. Tobacman also testified that Perlmutter's two or three most recent statements were kept in her desk drawer, until either he or his daughter, also an accountant, entered them into records and put them in the box.

Conclusions

Perlmutter is alleged to have violated 18 U.S.C. §§ 1001 and 2(b) by knowingly withholding from the government material information concerning the two $9,800 deposits on March 11, 1981 (Count One) and material information concerning the $5,000 and $7,000 transactions on October 14, 1982 (Count Seven). She is also alleged to have violated 31 U.S.C. §§ 5312(a)(2), 5313 and 5322 and 18 U.S.C. § 2(b) by causing the Merchants Bank to fail to file a CTR in connection with the two $9,800 deposits on March 11, 1981 (Count Two) and causing the Emigrant Bank to fail to file a CTR in connection with the $5,000 and $7,000 transactions on October 14, 1982 (Count Eight).

The Currency and Foreign Transactions Reporting Act, presently codified in 31 U.S. §§ 5311 *et seq.*, authorizes the Secretary of the Treasury to require financial institutions to file "certain reports or records hav[ing] a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311. Section 5313(a) provides that a domestic financial institution, involved in a transaction for the payment, receipt, or transfer of United States currency in an amount or under circumstances that the Secretary prescribes, shall file a report in the time and manner that the Secretary prescribes. 31 U.S.C.

§ 5313(a).[8] The Secretary's regulations in effect at the time of these events are set forth in 31 C.F.R. § 103.22(a) (1982):

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

The reporting form which the Secretary issued during the relevant period contained the following statement:

> Multiple transactions by or for any person which in one day total more than $10,000 should be treated as a single transaction if the financial institution is aware of them.

IRS Form 4789.

In *United States v. Heyman,* 794 F.2d 788 (2d Cir. 1986), the Second Circuit held that deposits totaling over $10,000, made at the same financial institution on the same day, trigger a CTR filing requirement under 31 U.S.C. § 5313(a). Although the statute applies on its face to financial institutions alone, the Court held that private persons could be convicted of willfully structuring transactions so as to cause a financial institution to fail to file a CTR. The court stated that although the facts involved an employee of the institution, a customer who structured his transactions with the intent to conceal from the institution the

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8. The corresponding section of former Title 31, 31 U.S.C. § 1081, was essentially the same.

need to file a CTR would be criminally liable under § 2(b) for causing the bank to violate the reporting requirement. *See* 794 F.2d at 792 n.6. This, the Court noted, was a necessary result of the language of 18 U.S.C. § 2(b) which does not distinguish between customer and employee when it provides that "*[w]hoever* willfully causes an act to be done which if directly performed by him would be an offense against the United States" is liable for that act.

In the intervening period between Perlmutter's financial transactions and the present, Congress explicitly imposed liability on private persons for the conduct at issue here, *see* 26 U.S.C. § 6050I (West Supp. 1986), thus placing a reporting burden on any person who receives in excess of $10,000 in one or two or more related transactions:

> (a) Cash receipts of more that $10,000.00 — Any person —
>
> > (1) who is engaged in a trade or business, and
> >
> > (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),
>
> shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

The present case, of course, is being tried under 31 U.S.C. § 5313(a), which does not by its express terms address the conduct of persons other than financial institutions.

The government must show on each of Counts Two and Eight 1) that the defendant caused the financial institution to fail to file a CTR when it was required to do so and 2) that the defendant acted "willfully" in causing the institution to fail to file a CTR. In order to act "willfully," the defendant must know that banks are required to report currrency transactions totally over $10,000 to the government, and have intended to foil that reporting obligation. *See United States v. Nersesian,* S 84 Cr. 1034 (charge of the court at Tr. 10,705-10). Circumstantial evidence alone is often sufficient to show criminal intent. *See United States v. Natelli,* 527 F.2d 311, 318 (2d Cir. 1975), *cert. denied,* 425 U.S. 934 (1976).

The charges under Counts One and Seven of violations of 18 U.S.C. § 1001 involve the same acts on the part of Perlmutter. Section 1001 provides that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

While the concealment of a fact that no one has a legal duty to disclose may not be a violation of this section, *see United States v. Irwin,* 654 F.2d 671, 678 (10th Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982), which is not the case where a regulation or form requires disclosure. *Id., cited in United States v. Tobon-Builes,* 706 F.2d 1092, 1097 (11th Cir. 1983). Although the reporting requirements under the Currency and Foreign Transactions Reporting Act apply on their face only to financial institutions, the *Heyman* court's interpretation of 18 U.S.C. § 2(b) requires the conclusion that under 18 U.S.C. § 1001 as well as 31 U.S.C. §§ 5311 *et seq.* the customer of a financial institution

is required to disclose that cumulative deposits of over $10,000 are in fact all one transaction. *See Heyman, supra.* 794 F.2d 738; *see also Tobon-Builes, supra.* 706 F.2d at 1099. This is so "even though the financial institutions had no criminal intent and thus were innocent of any concealment under section 1001." *Tobon-Builes, supra,* 706 F.2d at 1100; *see Heyman, supra,* 794 F.2d 788.

An essential element of a violation of 18 U.S.C. § 1001 is that the fact concealed is material. *See United States v. Marchisio,* 344 F.2d 653, 666 (2d Cir. 1965). In this case, the facts alleged to have been concealed are that "split" transactions were in reality part of the same transaction. Where, as here, the large currency transactions were on behalf of non-taxpaying clients and where the purpose of the concealment was to avoid the filing of CTR's, which have been found by Congress to have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings," the concealment of the fact that the multiple transactions were in fact a single transaction is material as a matter of law.

The currency transactions at issue were clearly within the jurisdiction of a department or agency of the United States, specifically the Department of the Treasury, Internal Revenue Service. The government is not required to prove that the defendant knew that the statement was within the jurisdiction of a federal agency. *See United States v. Yermian,* 468 U.S. 63 (1984).

Therefore, the remaining elements of a violation of 18 U.S.C. § 1001 are that 1) the defendant concealed the fact that multiple currency transactions were in fact one transaction; 2) she did so by trick, scheme, or device, and 3) that she acted willfully and knowingly. As in the case of willfulness, a defendant's knowledge may be shown by circumstantial evidence. *See United States v. Sheiner,* 410 F.2d 337, 340 (2d Cir.), *cert. denied,* 396 U.S. 825 (1969).

Counts One and Two

The government has shown that Perlmutter's office participated in the negotiations and preparation of documents in connection with the Washington transaction and obtained the financial instruments used in that transaction. On January 29, 1981, Perlmutter drew a check for $6,000 as a down payment for the Seventh Avenue properties, pursuant to the contract between Preston Homes and Washington. On March 2, she incorporated the 2283 7th Avenue Corporation on Washington's behalf. On March 11, she purchased, with cash supplied by Washington, eight tellers' checks for a total of $29,000, made payable to herself and to 2283 7th Avenue Corporation. On that same day, $9,800 in cash was deposited in each of Perlmutter's and Muraskin's special accounts at a different bank, Merchants. The depositor used Perlmutter's preprinted form for one $9,800 deposit, and knew Muraskin's account number for the other. The next morning, $200 was deposited in each account, enabling Perlmutter and Muraskin to each draw checks of $10,000, made payable to 2283 7th Avenue Corporation. The deposit slip for the $200 deposit in Perlmutter's account was filled out by Perlmutter; the deposit slip for the $200 deposit in Muraskin's account was filled out by Muraskin. Each of the $10,000 checks were deposited the next day into Perlmutter's account by Muraskin using a preprinted form. They were used to cover a $20,500 check written by Perlmutter to the Title Guarantee Company for back taxes on the property.

Regardless of Perlmutter's extensive participation in the Washington transaction and her position as aunt and employer of David Muraskin, there is reasonable doubt that she participated in or directed the splitting of the $19,600 deposit into two separate $9,800 deposits. Earlier that same day, she took $29,000 in cash to Emigrant Savings Bank, for which a CTR was filed. There is no evidence to explain why she would avoid the filing of a CTR

on one part but not all of a large cash transaction, nor any evidence as to when she first became aware of the CTR procedure. Furthermore, the handwriting expert could not identify the handwriting on the deposit slips as belonging to her, and Laura Nadal identified it as David Muraskin's. The possibility exists that Perlmutter gave Muraskin the cash to take to Merchants, and that he, without her knowledge or direction, decided to break up the deposit. One of the deposit slips was preprinted with her name and account number, but the other was a form obtainable at the bank. This evidence fails to establish proof beyond a reasonable doubt as to Perlmutter's intent.

Counts Seven and Eight

The government has established that Perlmutter participated in a similar fashion in Monsanto's purchase of the Riverdale co-op in August through October, 1982, but with an intent clarified by the preceding events. A year before, Perlmutter had incorporated for Monsanto the Doll Holding Corporation, in whose name Monsanto first attempted to buy the co-op. In October, 1982, Nadal purchased two $5,000 cashier's checks from Republic National on consecutive days, made to the order of Hermena Perlmutter. Ten $500 money orders were purchased from a separate bank on the second day, October 14, half of which were filled out in part by Perlmutter, and the remainder by Muraskin. That same day, two tellers' checks were purchased from yet another bank, from different tellers, and made out to different payees. The request form for the $5,000 check, payable to Hermena Perlmutter, was filled out by Muraskin. Although the co-op was purchased by Monsanto, his name does not appear on any checks, the contract, the deed of sale, or money orders. On each of the checks and money orders, however, appears the legend: Re purchase of Co-op, 3240 Riverdale.

From the credible testimony of Evelyn McLoughlin, the

Emigrant branch manager, who testified that she almost always told her customers when she was filling out a CTR and remembers explicitly telling Perlmutter such on one occasion, it is a reasonable inference that at least as of the time of this transaction and as a consequence of the Washington transaction Perlmutter had the requisite knowledge under 13 U.S.C. § 1001 and § 2 of the CTR reporting requirements.

By October, 1982, McLoughlin had filled out all three CTR's filed on Perlmutter's behalf by Emigrant, and, therefore, had certainly told her of at least one CTR filing. In addition, Nadal, although she had an acknowledged grievance against Perlmutter arising out of her discharge, testified that she overheard at the time of the Washington transaction a conversation between Perlmutter and Tobacman in which CTR's were discussed. Neither the government nor Perlmutter asked Tobacman about the conversation reported by Nadal which at most is icing on the inference arising from the undisputed facts.

The circumstances surrounding the Monsanto transaction demonstrate Perlmutter's intent to circumvent the requirements, as well as her connection to the $5,000 and $7,000 transactions. The testimony of Nadal about delivery of cash in the briefcase by Monsanto has the ring of truth, despite Nadal's hostility to Perlmutter. It is entirely reasonable to infer that Perlmutter, on this occasion, directed people in her office and acted herself to take large amounts of cash from a single source, break it into amounts of less than $10,000, and engage in transactions at different banks and in the name of different payees in order to hide from the different banks the fact that it came from a single source and the identity of the source. Nadal's purchase of the two $5,000 cashier's checks, made out to Perlmutter, from Republic National Bank on two consecutive days must logically have been done at the direction of Perlmutter.

Similarly, it is only logical that Perlmutter either purchased herself or sent someone like Muraskin to Union Federal Savings to get the $5,000 in $500 money orders, and to Emigrant to get the teller's checks. Muraskin's writing is on the only available check requisition form, for $5,000, from Emigrant. Only a customer of the bank, which Manson was not, could obtain a teller's check. If Perlmutter herself was at the bank with Muraskin, standing in a different line, she clearly had the requisite intent to break the $12,000 they walked in with into amounts that would not trigger the CTR reporting requirement. Even if Perlmutter was not with Muraskin, the inference that she explicitly or implicitly directed him to split the transaction is compelling. For even if Muraskin acted without Perlmutter's knowledge in connection with the March, 1981 Washington transaction, it strains belief that he did so again here. Perlmutter certainly knew of the two $9,800 deposits in the Washington transaction immediately after the fact, since the next day she and Muraskin each filled out a $200 deposit slip and each wrote a $10,000 check for the Washington closing. It is a logical inference that she knew why it was done, since she was told that day by McLoughlin that a CTR had been filed, and since Nadal testified to overhearing the conversation about CTR's. Even if she gave $12,000 to Muraskin in October, 1982 with the innocent instruction of "Get some checks," she must have known and, given all the circumstances, must have intended that he would split the transaction.

There is no direct evidence of why Perlmutter concealed the fact that some transactions were in actuality a single transaction and did not conceal the fact that the $120,000 deposit went for a single purpose, or why she broke down the amounts of the instruments used for the purchase of the Riverdale co-op and yet wrote "purchase of co-op, 3240 Riverdale" on each of them. Neither is there an explanation of why Perlmutter caused a bank to fail to file a CTR on at least one occasion and did not cause

banks to fail to file a CTR on four other occasions.[9] Nevertheless, it is a wholly reasonable inference that she intentionally avoided CTR reporting requirements on the occasion of the Monsanto transaction by directing people in her office to engage in multiple transactions at multiple banks with multiple payees and no reasonable doubt can be entertained to the contrary.

These facts establish that Perlmutter acted willfully, under 13 U.S.C. § 2(b), in the sense that *Heyman* defines it — with knowledge of the CTR reporting requirements and with the intent to cause the bank to fail to file a CTR. At the time of these acts, however, *Heyman* was inchoate. Although the statute does not state that a private person's conduct in causing a bank to fail to file constitutes a criminal act, and even though the bank did not violate the law by virtue of the fact that it did not know that this was a single transaction, *Heyman* requires that this court find Perlmutter guilty of Counts Seven and Eight.

Therefore, because Perlmutter knowingly and intentionally caused Emigrant, by the device of splitting up a $12,000 transaction into amounts less than $10,000, to fail to file a CTR, Perlmutter is found guilty as charged on Counts Seven and Eight.

Count Ten

Unlike Counts One and Seven, which charge concealment of a material fact under 18 U.S.C. § 1001, Count Ten charges Perlmutter with making a false statement within the jurisdiction of a department or agency of the United States, specifically, the IRS, as prohibited by the same section. In the case of false representation, there is no requirement in the Second Circuit that

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9. The fourth CTR was filed on October 26, 1981 and has not been shown to be related to the transactions at issue here.

the false statement be shown to be material. *See, e.g., United States v. Elkin,* 731 F. 2d 1005, 1009 (2d Cir.), *cert. denied,* 469 U.S. 822 (1984).

To establish a violation of 18 U.S.C. § 1001, the government must prove that 1) the defendant made a false statement on or about May 9, 1984, 2) the statement was made with the knowledge that it was false, 3) the statement was made unlawfully, knowingly, and willfully, and 4) the statement was made in relation to a matter within the jurisdiction of a department or agency of the United States. *See* 1 L. Sand, J. Siffert, W. Loughlin, S. Reiss, Modern Federal Jury Instructions (Criminal) 36-25 (1985); *United States v. Silva,* 715 F.2d 43, 49 (2d Cir. 1983) (citing *United States v. Adler,* 380 F.2d 917, 920 (2d Cir.), *cert. denied,* 389 U.S. 1006 (1967), and *United States v. McCue,* 301 F.2d 452, 454 (2d Cir.), *cert. denied,* 370 U.S. 939 (1962). Section 1001 has been held to apply to false statements made during the course of an IRS interview. *See United States v. Morris,* 741 F.2d 188 (8th Cir. 1984); *cf. United States v. McCue, supra,* 301 F.2d 452 (defendants convicted on basis of statements made under oath).

As to the element of falsity, the government must show "that the defendant either knew the statement was false . . . or acted with a conscious purpose to avoid learning the truth." *United States v. West,* 666 F.2d 16, 19 (2d Cir. 1981). Otherwise stated, the element is satisfied if the defendant knowingly and willfully "acted with . . . disregard of whether the statements made were true or with a conscious effort to avoid learning the truth . . . even though . . . not specifically aware of the facts which would establish the falsity of the statements." *United States v. Sarrantos,* 455 F.2d 877, 881 (2d Cir. 1972); *United States v. Egenberg,* 441 F.2d 441, 444 (2d Cir.), *cert. denied,* 404 U.S. 994 (1971); *United States v. Hanlon,* 548 F.2d 1096, 1101 (2d Cir. 1977). However, the defendant would not be guilty if the court finds that the defendant in fact believed the statements to be true. *See, e.g.,*

United States v. Morales, 577 F.2d 769, 773-74 (2d Cir. 1978).

Special Agent Polvere, a credible witness, testified that Perlmutter stated to him on May 9, 1984 during the course of an IRS interview that she did not have the $120,000 check or her Merchants November 1981 bank statement, although she had already looked for them at the bank's request. The statement that she did not have the records was proved false in the summer of 1985 when Bernard Tobacman went to Perlmutter's files and pulled out the records in question.

There is reasonable doubt, however, both that a false statement was actually made and that Perlmutter knew it to be false. Although Polvere took notes immediately after the interview of what had transpired, he did not take notes contemporaneously with the interview. Therefore, the context of this statement is not fully recorded. Perlmutter may have meant that she did not have the statement and check available. Alternatively, since she also stated that the $120,000 had nothing to do with Washington and that she would not discuss her dealings with clients, she may have meant that she would not give Polvere any documentation of her dealings with other clients.

Even if Perlmutter meant to state that she did not have the statement and check, there is reasonable doubt that she believed that representation to be false. The evidence did not show that Perlmutter knew where past records were. She did not personally file the bank statements and checks in the cardboard box in which they were kept. After she placed the most recent ones in her desk drawer, Tobacman or his daughter moved them from there to the box in the cabinet. In 1984, Perlmutter may not have known whether her 1981 records were merely hiding in one of her cabinets or lost. Neither Nadal nor anyone else testified as to Perlmutter's knowledge in this regard.

Finally, Perlmutter may have looked for the records in the right place and simply have overlooked them. Although one might surmise that she may have never looked for them, knowing that the bank had no records of this transaction, there is reasonable doubt that she knew her statement to be false when she told Polvere that she did not have the records.

Therefore, Perlmutter is found not guilty on Counts One, Two, and Ten, but guilty on Counts Seven and Eight.

IT IS SO ORDERED.

DATED: New York, N.Y.
February 19, 1987

s/ R.W. Sweet
ROBERT W. SWEET
U.S.D.J.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 20, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Cr. 207 (RWS)

UNITED STATES OF AMERICA,

-against-

HERMENA PERLMUTTER,

Defendant.

OPINION

APPEARANCES:

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SWEET, D.J.

Defendant Hermena Perlmutter ("Perlmutter") has moved pursuant to Fed.R.Crim.P. Rule 12(b)(2) for dismissal of counts one through eight of the nine-count superseding indictment filed April 17, 1986 charging violations of the Bank Secrecy Act on the grounds that these counts are facially insufficient. For the reasons set forth below, the motion for dismissal of counts one through eight is granted.

The Indictment

The counts of the indictment challenged here relate to the financial services which Perlmutter, an attorney, performed for clients in connection with her legal representation. Four transactions are principally at issue, each giving rise to a pair of indictment counts comprising the eight counts at issue. Each pair, as it relates to a transaction, will be individually summarized as set forth in the indictment and the moving papers.

Counts one and two of the indictment relate to Perlmutter's services in connection with her purchase of real estate on behalf of a client, Daniel Washington, in March, 1981. According to the government, Perlmutter assisted Washington in "laundering" money obtained from the drug trade by making two deposits of $9,300.00 on March 11, 1981, each in different bank accounts, at the Merchants' Bank of New York followed by an additional $200.00 deposit in each account the following day. No Currency

Transaction Report ("CTR") was filed for these transactions. Count One of the indictment charges that the defendant concealed from the Department of the Treasury and the Immigration and Naturalization Service the fact that "facially separate" deposits of United States currency were made in violation of 18 U.S.C. sections 1001[1] and 2(b)[2], which proscribe respectively concealment of material information from the federal government and aiding and abetting or causing the banks to commit a crime.

Count Two charges Perlmutter with aiding and abetting, in violation of 18 U.S.C. 2(b), the Merchants Bank to fail to file a CTR in violation of the Currency Transaction Reporting Act, 31 U.S.C. § 5311 *et seq.*,[3] otherwise known as the Bank Secrecy Act. In essence, Counts One and Two charge Perlmutter with structuring her transactions to avoid triggering the bank's $10,000 reporting requirement.

Counts Seven and Eight involve the same pattern of transactions in furtherance of another real estate purchase on behalf of Perlmutter's clients. According to the government, on October 14, 1982, Perlmutter purchased two Emigrant Savings Bank tellers' checks for $5,000.00 and $7,000.00 in different names to avoid exceeding the $10,000.00 reporting limit. No CTR was filed for this transaction, and the government similarly has charged violations of 18 U.S.C. § 1001, 2(b) and 31 U.S.C. § 5311 *et seq.*

Counts Three through Six of the indictment pertain to a single real estate transaction but involve two separate currency transactions which support the related "pairs" of indictment counts. The government claims that on August 19, 1981 Perlmutter purchased tellers' checks from Emigrant Savings Bank in her own name in the amounts of $5,000.00, $3,500.00 (two) and $2,000.00, totalling $14,000.00 in a single day. While a CTR was filed for these checks, the government contends that Perlmutter withheld or concealed the person on whose behalf the transaction was made,

in violation of 18 U.S.C. § 1001 and 2(b). Count Four derivatively charges that this failure to disclose the principal of the transaction caused the Emigrant Savings Bank to file a false CTR with respect to the purchase of $14,000.00 of tellers' checks in violation of the Bank Secrecy Act and 18 U.S.C. § 2(b). Counts Five and Six charge violations of the same section respectively for a November 9, 1981 purchase of a certified check in the amount of $120,000.00. A CTR was also filed for this real estate transaction, but it did not reveal that the transaction was on behalf of anyone other than Perlmutter.

Perlmutter, through each of the four transactions, is thus alleged to have violated 18 U.S.C. § 1001 by withholding or concealing from the government material information concerning the transactions, and is alleged to have violated 18 U.S.C. § 5311 *et seq* by causing the banks to file an inaccurate CTR or not to file a CTR at all.[4]

Statutory Scheme

Section 5313 of the Currency Transaction Reporting Act authorized the Secretary of the Treasury to require financial institutions and other participants in certain currency transactions to file a CTR detailing the transaction for the Secretary:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes) in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution, and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the

> way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

31 U.S.C. § 5313(a).

The Secretary chose to exercise only a subpart of this plenary power to require institutions and other participants to file CTRs. The Secretary's regulations in effect at the time of these events subjected only financial institutions (defined in 31 U.S.C. § 5312(a)(2)), and not individuals to this reporting requirement for transactions in currency of over $10,000.00:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

31 C.F.R. § 103.22(a) (1982).[5]

The reporting form which the Secretary issued during the relevant period was Internal Revenue Service ("IRS") Form 4789, the only IRS document to mention the problem of multiple transactions designed to avoid the $10,000.00 reporting threshold.[6]

> Each financial institution must file a Form 4789 for each deposit, withdrawal, exchange of currency or other payment or transfer, by, through or to that financial institution, which involves a transaction in currency of more than $10,000.

> Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction if the financial institution is aware of them.

Congress has enacted, in the intervening period between these financial transactions and the present, section 6050 I of the Internal Revenue Code, 26 U.S.C. § 6050I (West Dec. 1984), which places a similar reporting burden on any person who receives in excess of $10,000 in one or two or more related transactions, provides in part:

> (a) Cash Receipts of more than $10,000.00 — Any person —
>
> (1) who is engaged in a trade or business, and
>
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions).
>
> shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

Therefore, this court, analyzing the indictment under statutes predating section 6050I, faces a limited, but, nevertheless, important statutory ambiguity.

Discussion

This facial challenge to the Perlmutter indictment poses a question without prior Second Circuit treatment,[7] in the context

of a split of opinion among the circuit courts. Counts One through Eight of the indictment essentially charge Perlmutter with "structuring" her financial dealings for clients to avoid the $10,000.00 reporting requirements in 31 C.F.R. § 103.22. Although there is no dispute that only the bank is required to file a CTR in such an instance, the government asserts that this avoidance tactic constitutes aiding and abetting, 18 U.S.C. § 2(b), or causing the bank to violate the Bank Security Act, 31 U.S.C. §§ 5313, 5322 and causes the concealment of material facts from the federal government in violation of 18 U.S.C. §§ 1001, and 2(b).

Perlmutter, relying on the "void for vagueness" analysis in the recent opinions of the First Circuit in *United States v. Anzalone,* 766 F.2d 676 (1st Cir. 1985) and the Ninth Circuit in *United States v. Varbel,* 780 F.2d 758 (9th Cir. 1986) contends that the imposition of criminal sanctions under these circumstances violates her Fifth Amendment due process rights because she had no fair warning or notice that structuring her transaction to avoid reporting statutes would result in criminal penalties. According to Perlmutter, the Secretary's decision to use only a a small part of the plenary power granted by 31 U.S.C. § 5313 by requiring only financial institutions to file a CTR, 31 CFR § 103.22, reinforced the impression that private persons would not incur criminal liability for apportioning transactions to avoid reporting, as they had no independent duty to consolidate those transactions or inform the bank of their existence. As the *Anzalone* court observed, the Comptroller General of the United States specifically noted in a Report to Congress that the Secretary's regulations ". . . were silent on the propriety of a customer's conducting multiple transactions to avoid reporting." 766 F.2d at 681-82, *citing* "Bank Secrecy Act Reporting Requirements Have Not Yet Met Expectations, Suggesting Need for Amendment," GED-81-80, July 23, 1981.

The government relies principally on two earlier Fifth and Eleventh Circuit cases, *United States v. Tobon-Builes,* 706 F.2d 1092 (11th Cir.), *reh. denied,* 716 F.2d 914 (1983) and *United States v. Thompson,* 603 F.2d 1200 (5th Cir. 1979) and their district court progeny, to support the contention that criminal sanctions may be imposed on those who purposefully attempt to circumvent the bank's filing of a CTR, particularly in instances when same-day transactions are fractured so that no single exchange reaches the $10,000 limit which if combined would require the bank to file a CTR. The government thus embraces the "substance over form approach" of *United States v. Tobon-Builes, supra,* 706 F.2d at 1098 explicitly rejected by the *Anzalone* court:[4]

> In the instant case, Tobon's wilfulness was clearly established by evidence showing he knew about the currency reporting requirements and that he purposely sought to prevent the financial institutions from filing required reports by using false names and by structuring his transactions as multiple smaller transactions under $10,000. Moreover, because of Tobon's deceptive transactions, the financial institutions, i.e., the innocent intermediaries, were duped into not reporting currency transactions they would have had a duty to report had they known about Tobon's scheme. Thus, by operation of § 2(b), Tobon's criminal intent to cause concealment is joined together with his innocent intermediaries' duties to report (i.e their capacity to commit the crime of concealment) and their failure to report (i.e "the forbidden act") to constitute the elements of actionable concealment under § 1001.

Id. at 1101. *See also United States v. Richter,* 610 F. Supp. 480 (N.D.III. 1985), *aff'd.* 785 F.2d 312 (7th Cir 1986); *United States v. Konefal,* 566 F. Supp. 698 (N.D.N.Y. 1983).

While the bootstrapping of aiding and abetting crimes with hypothetical bank violations is an appealing way to punish clear attempts to circumvent the important purposes behind the Bank Secrecy Act, it employs a "cart-before-the-horse" reasoning which the First Circuit in *Anzalone* correctly identified as a threat to due process protections. The government's theory would convict Perlmutter for causing the bank to fail to file CTR's on transactions which, had they been grouped together, would have required that a CTR be filed. Although nothing in Title 31 or the implementing regulations prohibited financial posturing in avoidance of the $10,000 limit, the failure to file such a report supplies the "crime" underlying the aiding and abetting violation in the government's view. As the *Anzalone* court observed:

> If the government wishes to impose a duty on customers, or "other participants in the transaction" to report "structured" transactions, let it require so in plain language. It should not attempt to impose such a duty by implication, expecting that the courts will stretch statutory construction past the breaking point to accommodate the government's interpretation.
>
> * * *
>
> As no such duty existed on behalf of the appellant to report to the Secretary either directly or through the financial institution, there can be no concealment in violation of 18 U.S.C § 1001 . . . The 18 U.S.C. § 2 allegations must also therefore fail since appellant did not abet or cause anyone to commit a crime against the United States. The Bank, under the circumstances of this case, did not commit any crime by failing to report transactions, as it lacked knowledge of their "structured" nature.

United States v. Anzalone, supra. 766 F.2d at 682-683.[9]

The same is true for Counts Three, Four, Five and Six of the indictmment, which charge Perlmutter under 18 U.S.C. §§ 2(b), 1001 with causing the bank to file false currency transaction reports which failed to disclose the party or whom the transaction was being made. Section 2(b) and 1001 liability for falsifying or concealing a material fact from the government is dependent upon the applicability of the Bank Secrecy Act reporting requirements to Perlmutter. The only mention of a duty to disclose the principal of the transaction appears in the enabling statute 31 U.S.C. § 5313, which instructs that "A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made." 31 U.S.C. § 5313(a). However, all mention of these "participants" was eliminated from the implementing regulations, 31 CFR § 103, 22(a) (1984) which imposed no such duty on the bank. Although form 4789 calls for, among other information, the name and address of a person on behalf of whom the transaction is being conducted, this form places the reporting duty on the bank and not the customer who makes the financial exchange and as discussed *supra*, was not a properly adopted agency rule. As the court in *Anzalone* succinctly stated:

> But in prosecuting a § 1001 concealment violation, it is incumbent upon the government to prove that the defendant has a *legal duty* to disclose the material facts at the time he was alleged to have concealed them . . . As no such duty existed on behalf of appellant to report to the Secretary either directly or through the financial institution, there can be no concealment in violation of 18 U.S.C. § 1001.

United States v. Anzalone, supra, 76 F.2d at 683 (citations omitted) (emphasis in original); *see also United States v. Varbel, supra,* 780 F.2d at 762 (since appellants had no duty to report their currency transactions to or through the bank, there can be no concealment in violation of 18 U.S.C. § 1001). *Contra United States v. Cook,* 745 F.2d 1311, 1314-1315, (10th Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S. Ct. 1205 (1985); *United States v. Puerto,* 730 F.2d 627, 633 (11th Cir.), *cert. denied,* ____ U.S. ____, 105 S. Ct. 162 (1984).

The government objects to this void for vagueness or lack of notice argument contending that the presence of Perlmutter's explicit intent to structure the transaction to avoid the $10,000 threshold belies a claim that the statute is so vague that she was unaware of what would trigger the reporting requirements under the statute. The government is clearly correct in concluding that Perlmutter intended to avoid reporting requirements, as the intent inherent in depositing $9,800 in two accounts on one day, followed by $200 the next, speaks for itself. However, focusing on the "structuring" intent does not mean that Perlmutter had notice that the explicit $10,000 line drawn by the government would be blurred by an intent analysis. While it is unfortunate that what some would label improper avoidance behavior cannot be punished in this instance, the due process clause requires that a criminal offense must be explicit, and not merely inferrable from the relevant statute. *See United States v. Varbel, supra,* 780 F.2d at 762; *United States v. Anzalone, supra,* 766 F.2d at 682; *contra United States v. Cook, supra,* 745 F.2d at 1316 (because a person of ordinary intelligence would be on notice that [such] conduct was prohibited by the statute, 31 U.S.C § 5313 is not unconstitutionally vague as applied to defendant).

The government contends that prior Second Circuit precedents interpreting section 2(b) liability are dispositive of this issue in the absence of explicit Second Circuit authority on the Bank

Secrecy Act. The government cites *United States v. Ruffin,* 613 F.2d 408 (2nd Cir. 1979) and *United States v. Margiotta,* 688 F.2d 108 (2nd Cir. 1982), *cert. denied.* 461 U.S. 913 (1983) for the proposition that Perlmutter can be liable for causing an innocent intermediary, in this case the bank, to commit a criminal act, although only the bank had a reporting duty under the relevant statute. In *United States v. Ruffin, supra,* the defendant was convicted for causing a local community organization to fraudulently obtain funds from the office of Economic Opportunity, chartered pursuant to the Economic Opportunity Act of 1964, 42 U.S.C. § 2701. The defendants scheme was carried out through the acts of a director of the intermediary agency receiving the federal funds, who was not convicted under the statute. In construing section 2(b) to permit a criminal conviction for causing the intermediary to violate the Economic Opportunity Act (which only the officer of the agency had the capacity to violate) the court observed:

> The guilt or innocence of the intermediary, therefore, becomes irrelevant in determining whether a person charged as a co-principal under § 2(b) may be found guilty. . . The issue before us, therefore, narrows down to whether one who would be incapable of violating that law if he acted alone (i.e., Ruffin) may nevertheless be found guilty where he causes the prohibited conduct to be committed by another who has the capacity to violate it. . . but who has been acquitted. We are persuaded that such a "causer" may be found guilty under § 2(b).

The Second Circuit applied the same "causer" principles in *United States v. Margiotta, supra,* to hold that Margiotta, the chairman of the Nassau and Hempstead Republican parties, was guilty of causing an innocent elected town official to appoint a

preselected town insurance broker who would effectuate a kickback scheme in insurance payments. The Circuit Court held that although Margiotta was not directly guilty of extorting moneys pursuant to the Hobbs Act, 18 U.S.C. § 1951, as it proscribes extortion "under color of official right," 18 U.S.C. § 1951(b)(2), Margiotta could be convicted for causing the intermediary to commit the crime. Construing section 2(b) the court stated:

> This section is based on the precept that an individual with the requisite criminal intent may be held liable as a principal if he is a cause in fact in the commission of a crime, notwithstanding that the proscribed conduct is achieved through the actions of innocent intermediaries. . .
>
> . . .
>
> It is unnecessary that the intermediary who commits the act have a criminal intent.

Id. at 131.

While the *Ruffin* and *Margiotta* cases bear a skeletal resemblance to the issue at hand, the reasoning which applies the circumstances of these prior § 2(b) cases to the Bank Secrecy Act fails for the same reason as the government's "intent" analysis above. In both *Ruffin* and *Margiotta,* the Second Circuit *assumed* the criminality of the ultimate acts of fraud and extortion respectively; indeed the criminality of those ultimate acts was not disputed; rather it was the innocence of the intermediary which gave concern to the Second Circuit when applying the section 2(b) analysis. The same cannot be said for applying this analysis to the case at bar. The rationale of *Ruffin* and *Margiotta* appears to assume the criminality of the ultimate act of the innocent intermediary, the precise issue which according to *Anzalone* cannot

be established under this statutory scheme. By retroactively recharacterizing these transactions as transactions which would have violated the Bank Secrecy Act, the government is able to impute "criminal intent" to Perlmutter where she had no duty to file CTRs in the first place. In essence, this projection of prior section 2(b) analysis leaps over the central question of whether avoidance behavior or the structuring of deposits was criminal at all under the Treasury regulations then in effect.

In short, the question unearthed by the *Anzalone* court is, regardless of Perlmutter's intent, whether she had notice that this avoidance behavior would subject her to criminal penalties. Answering in the negative, the First Circuit analysis places the notice dilemma in its constitutional context, and in this court's opinion displaces the less searching analysis of the *Thompson* and *Tobon-Builes* courts. Perlmutter's motion is granted, and counts one through eight of the indictment are therefore dismissed.

IT IS SO ORDERED.

DATED: New York, N.Y.
May 20, 1986

s/ R.W. Sweet
ROBERT W. SWEET
U.S.D.J.

1 § 18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2 18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as principal.
>
> (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

3 Counts one through six of the indictment occurred prior to the recodification of the Act on September 13, 1982, Pub.L. 97-258. Section 1081, corresponding to effective Section 5313 stated in relevant part:

> Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail

> as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, in such amounts as the Secretary shall by regulation prescribe.

4 Count Nine of the indictment, which is not challenged in this motion, charges Perlmutter with inducing a witness to make false or misleading statements to a grand jury regarding the preparation of tax returns for a client, in violation of Title 18 U.S.C. § 1503.

5 The Secretary's revised regulations are substantially similar to those in effect in 1982. They provide:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

31 C.F.R. § 103.22(a) (1984).

6 These admonitions on the currency transaction form do not have the force of law, as they were not rules or regulations adopted by the Department of the Treasury pursuant to the notice and comment rulemaking in Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* *United States v. Anzalone,* 766 F.2d 676, 679 n.6 (1st Cir. 1985); *United States v. Richter,* 610 F. Supp. 480, 489 n.14 (N.D. III. 1985).

7 The Second Circuit has considered the validity of an indictment which charges persons as financial institutions within the meaning of 31 U.S.C. § 5314, *United States v. Goldberg,* 587 F. Supp. 302 (S.D.N.Y. 1984), *dismissal vacated,* 756 F.2d 949 (2nd Cir.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 2706 (1985) and will hear an appeal of a verdict based upon a jury charge which incorporated the *Tobon-Builes* analysis in its instructions. *United States v. Heyman,* No. 85 Cr. 31 (S.D.N.Y. 1986).

8 Even prior to the First Circuit's opinion in *Anzalone,* the Eleventh Circuit had begun to question or limit the scope of its decision in *United States v. Tobon-Builes, supra,* in *United States v. Denemark,* 779 F.2d 1559 (11th Cir. 1981). Although the *Denemark* case attempted to limit both the *Tobon-Builes* and *Thompson* cases by distinguishing their facts, the court raised the same due process concerns:

> The recognized fact that Congress sought to give the Treasury an opportunity to obtain information about large amounts of cash cannot have the effect of making criminal conduct that does not fall within the very wide scope of Section 1001.
>
> We must be guided by the Supreme Court's decision in *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939): "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." 306 U.S. at 453, 59 S.Ct. at 619.

Id. at 1563.

9 The government also relies on a post-*Anzalone* decision by the Massachusetts District Court, *United States of America v. Bank of New England N.A.*, No. 85-381-Z (D.Mass., Memorandum Opinion, Jan. 10, 1986) to support its view that the *Anzalone* opinion does not preclude charging a defendant who makes a series of unitary transfers in a single day at a single bank with violations of the Bank Secrecy Act. As the government concedes, however, the bank itself was named as a defendant in the case and was not an "innocent intermediary" caused to violate reporting requirements.